

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

GREGER LEASING CORP., a Nevada) No. C-05-5117 SC
corporation,)
)
Plaintiff,) ORDER RE: CLAIMANTS'
) MOTION TO QUASH
v.) ARREST OR IN THE
) ALTERNATIVE FOR COSTS
) SECURITY
Barge PT. POTRERO, official number)
523213, in rem, TED BUHL and JANE)
DOE BUHL, individually, and the) AND
marital community composed thereof;)
BUHL DIVING & SALVAGE, a sole) ORDER RE: DEFENDANTS'
proprietorship, in personam) MOTION TO STAY AND
) COMPEL ARBITRATION
Defendants.)
)
AND ALL RELATED ACTIONS)
)

I. INTRODUCTION

Claimants in this case, Riverview Equipment Company LLC and Jerico Products, Inc. ("Claimants"), filed a motion seeking an adversary hearing pursuant to Federal Rule of Civil Procedure Supplemental Admiralty Rule E(4)(f) ("Supplemental Rule E(4)(f)") and Local Admiralty and Maritime Rule 4-8 ("Local Maritime Rule 4-8"). The Court held an adversary hearing on March 23 and 29, 2006 regarding the following limited issues: (1) whether the maritime lien was properly transferred to Plaintiff Corporation; (2) whether Plaintiff is estopped from enforcing its maritime lien; and (3) whether Claimants are entitled to security for costs. Defendants Ted Buhl and Buhl Diving and Salvage ("Defendants" or "Buhl") have also moved to stay the action and compel arbitration.

1 For the reasons set forth herein, the Court hereby DENIES
2 Claimants' motion to quash the arrest and GRANTS Defendants'
3 motion to stay the action and compel arbitration.

4 **II. BACKGROUND**

5 The facts surrounding the alleged maritime lien and the
6 arrest of in rem Defendant, the Barge Pt. Potrero ("Barge" or "in
7 rem Defendant"), have been set forth in previous Orders of this
8 Court, familiarity with which is presumed. For the purposes of
9 this Order, it is necessary to note only that Plaintiff filed a
10 verified Complaint on December 12, 2005, alleging that he held a
11 maritime lien on the Barge as a result of outstanding charges from
12 salvage and towing services Plaintiff provided in May and June
13 2005. Plaintiff first provided maritime services to Buhl pursuant
14 to an oral agreement, and subsequently entered into a written
15 contract titled "Towage Agreement, Terms and Conditions" ("Towage
16 Agreement").

17 After presenting Buhl with an invoice detailing allegedly
18 outstanding charges, Plaintiff sought and obtained an Order
19 arresting the Barge and transferring control of the vessel to a
20 substitute custodian. Claimants have since posted security for
21 the Barge, are in custody of the vessel, and have now moved for an
22 Order quashing the arrest, or, in the alternative, for costs
23 security. Defendants have joined Claimants in arguing that the
24 lien should be quashed, and have also separately moved this Court
25 to stay the action and compel the parties to arbitrate their
26 claims. Plaintiff has opposed these motions.

1 **III. LEGAL STANDARD**

2 A. Validity of the Lien

3 Under the Maritime Lien Act, 46 U.S.C. § 31342, an entity has
4 a lien on a vessel if they provide necessities to the vessel on
5 the order of the owner or an individual authorized by the owner.
6 A post-arrest adversary hearing under Rule E(4)(f) "is not
7 intended to resolve definitively the dispute between the parties,
8 but only to make a preliminary determination whether there were
9 reasonable grounds for issuing the arrest warrant." Lion de Mer
10 v. M/V Loretta V, No. Civ. L-98-921, 1998 WL 307077 at *2 (D. Md.
11 Apr. 3, 1998). Thus, Plaintiff bears the burden of showing that
12 "probable cause" existed to arrest the vessel, which "translates
13 roughly to requiring that plaintiff show entitlement to a maritime
14 lien." Newport News Shipbuilding and Dry Dock Company v. S.S.
15 Independence, 872 F. Supp. 262, 265 (E.D. Va. 1994).
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17 B. Agreement to Arbitrate

18 Under the United States Arbitration Act, 9 U.S.C. §1 et seq.,
19 Federal Courts must order the parties to arbitrate a dispute that
20 falls within the purview of a valid and binding agreement to
21 arbitrate. Given the compulsory language of the Act, the Court's
22 inquiry on a motion to compel arbitration is necessarily a limited
23 one, and should involve examining only whether (1) there is an
24 agreement to arbitrate; (2) there are arbitrable claims; and (3)
25 whether there has been a waiver of the right to arbitrate by the
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1 moving party or other defense to arbitration. Schwarzer, Tashima
2 & Wagstaff, Federal Civil Procedure Before Trial, § 16.99
3 (2004 ed.); see Chiron Corp. v. Ortho Diagnostic Systems, Inc.,
4 207 F.3d 1126, 1130 (9th Cir. 2000) .

5 **IV. DISCUSSION**

6 A. Claimants' Motion to Quash the Arrest

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8 In support of their position that the arrest of the Barge
9 should be quashed, Claimants first argue that Plaintiff Greger
10 Leasing Corp. cannot hold a lien on the Barge because that entity
11 did not exist at the time the salvage and towing services were
12 provided. See Claimants' Motion to Quash Arrest or in the
13 Alternative, for Costs Security at 7-9 ("Clmts.' Mot."). Rather,
14 those services were furnished by Ron Greger d/b/a Greger Leasing,
15 which was subsequently incorporated under the laws of the State of
16 Nevada, forming Greger Leasing Corp. Claimants argue that
17 Plaintiff has not proffered any evidence demonstrating that the
18 lien was formally transferred from the entity that provided the
19 services - Ron Greger d/b/a Greger Leasing - to the Plaintiff
20 Corporation. Id. at 8-9.

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22 However, Claimants' arguments in this respect are misguided.
23 Not only has Plaintiff proffered a document that purports to
24 transfer all assets and liabilities from Greger Leasing to Greger
25 Leasing Corp., but Claimants have overlooked the fact that Nevada
26 law provides that all assets and liabilities of a predecessor
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1 business organization become the assets and liabilities of the
2 successor organization when a conversion from one form to another
3 takes place. See Nev. Rev. Stat. § 92A.250(3)(a)-(g). Such a
4 transfer occurs by operation of law, and does not depend on
5 execution of a formal assignment. Id. Accordingly, the right to
6 enforce a maritime lien, if held by Ron Greger d/b/a Greger
7 Leasing, passed to Plaintiff upon its incorporation. Claimants'
8 argument on this point is therefore entirely without merit.

10 Claimants also assert that, even if Plaintiff did possess a
11 lien, Plaintiff is estopped from enforcing that lien because he
12 allegedly remarked that the sum Buhl owed him for salvage and
13 towing services had been satisfied. See Clmts.' Mot. at 9-11.
14 Claimants assert that they relied on Plaintiff's representation to
15 that effect, and that their reliance has operated to their
16 detriment. Id. Accordingly, Claimants assert, Plaintiff is
17 estopped from enforcing the lien.

19 In response, Plaintiff disputes ever having made the alleged
20 remark, and appeals to the Court to consider the likelihood of
21 waiving security on a debt that Plaintiff claims is in excess of
22 \$453,000.00.

23 At the adversary hearing, Claimants proffered the testimony
24 of Aaron and Christian Lind, who claim that Plaintiff said that
25 the account between himself and Buhl was "all good." Interpreting
26 this to mean that Plaintiff would not assert a lien against the
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1 vessel, Claimants purchased the Barge from Buhl only to later
2 learn that Plaintiff intended on enforcing his lien by means of
3 arresting the vessel and proceeding in rem.

4 In response, Plaintiff denied ever having said anything that
5 could be construed as a representation that Buhl's account had
6 been satisfied or that Greger would not assert a lien on the
7 vessel.
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9 While the Court does note that Plaintiff's explanation with
10 respect to the chronology and substance of important events in
11 this case is lacking in coherence and persuasiveness, there is
12 insufficient evidence to find that Plaintiff actually made the
13 purported statement, or that, even if made, it carried the legal
14 meaning that Claimants evidently ascribed to it. The alleged
15 utterance - that Plaintiff was "all good" with respect to Buhl's
16 account - was vigorously disputed by Plaintiff, is susceptible to
17 different interpretations, and appears to have been made in an
18 offhand manner, if actually made. Furthermore, the Court notes
19 that it would be truly extraordinary for a creditor to waive
20 security on a large debt merely upon oral representation by the
21 debtor that payment of the debt was forthcoming. Simply stated,
22 the Court finds that the evidence on this point is insufficient to
23 support a ruling that Plaintiff is estopped from asserting a
24 maritime lien, and, accordingly, Claimants' motion to quash the
25 arrest is DENIED.
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1 Despite the repeated efforts of the parties to turn a limited
2 adversary hearing into a full-blown trial on the merits, the
3 Court's inquiry at this point remains focused on the narrow issue
4 of whether Plaintiff has demonstrated probable cause to believe a
5 lien exists. In this respect, the Court finds that Plaintiff has
6 succeeded. However, in so ruling, the Court expresses no opinion
7 as to the actual amount owed Plaintiff for the work performed, and
8 in no way endorses Plaintiff's theory that the full value of the
9 Barge is necessary to secure his purported account receivable.

11 B. Motion for Costs Security

12 Claimants have also moved for an award of costs security
13 pursuant to Supplemental Admiralty Rule E(2)(b) and Admiralty
14 Local Rule 7-1. Supplemental Admiralty Rule E(2)(b) provides
15 that:

16 the court may...require the plaintiff, defendant, claimant, or
17 other party to give security, or additional security, in such
18 sum as the court shall direct, to pay all costs and expenses
19 that shall be awarded against the party by any interlocutory
20 order or by the final judgment, or on appeal by any appellate
21 court.

22 Admiralty Local Rule 7-1 directs that "[u]nless otherwise
23 ordered, the amount of security shall be \$500."

24 Claimants assert that the Court should order Plaintiff to post
25 a bond because good cause exists to question Plaintiff's ability
26 to satisfy an award of costs against him. Clmts.' Mot. at 13-14.
27 In support of this position, Claimants note that (1) Plaintiff is
28 an out-of-state corporation formed "solely for the purposes of

1 prosecuting this action"; (2) Plaintiff corporation was formed
2 only recently, on October 18, 2005, and allegedly has no assets;
3 and (3) Greger "would hide behind the asset-less Greger Corp. to
4 avoid paying a judgment for costs." Id. Claimants aver that
5 their costs to date have reached at least \$10,000.00, and that
6 future costs of \$15,000.00 are reasonably anticipated. Id.

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8 Claimants overlook the fact that the Court is limited by
9 Supplemental Admiralty Rule E(2)(b) to awarding security for costs
10 that will be awarded by this Court or upon appeal. However, there
11 is no basis for the presumption, necessary to Claimants' motion,
12 that an award of attorneys' fees will be forthcoming. Claimants
13 have not referred the Court to any law, rule of this Court, or
14 contractual provision that would entitle Claimants to an award of
15 attorneys' fees upon issuance of a judgment in their favor.
16 Accordingly, the Court finds that to the extent that Claimants'
17 motion seeks security in excess of the \$500.00 provided for by
18 Admiralty Local Rule 7-1, it is entirely unsupported by the law,
19 and therefore DENIES Claimants' motion for costs security. The
20 Court will grant Claimants an opportunity to renew their motion
21 for costs security in excess of \$500.00, if Claimants present an
22 appropriate basis for such an increase in security.

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C. Defendants' Motion to Stay and Compel Arbitration

Plaintiff has not contested that the Towage Agreement contained a binding arbitration clause¹, or that the claims asserted by Plaintiff in his verified Complaint are arbitrable. Rather, Plaintiff contends that any claim Defendants might have had to compel arbitration has been waived by Defendants' participation in the litigation. This, Plaintiff asserts, is inconsistent with a right to arbitration and would prejudice Plaintiff should the Court grant Defendants' motion. See Plaintiff's Opposition to Defendants' Motion to Stay Proceedings and Compel Arbitration at 3-5 ("Pl.'s Opp.").

To date, Defendants have filed an Answer, which contained Defendants' compulsory counterclaims. Even without reference to the long line of United States Supreme Court and Ninth Circuit precedents that clearly outline a deferential posture for Courts

¹ The Towage Agreement, Paragraph 17, provides:

17. Arbitration: Any dispute between the Tower and Owner arising out of this Agreement shall be arbitrated at _____, in the following manner, One (1) arbitrator is to be appointed by each of the parties hereto and a third by the two (2) so chosen. In all respect [sic] the procedures followed and the conduct of the arbitration shall be in accordance with the Federal Arbitration Act (9 U.S.C. 1, et seq.), and the decision of the arbitrators or any two (2) of them shall be final and binding. For the purpose of enforcing any award, this provision may be made a rule of the Federal court sitting in the state where the arbitration is held. The arbitrators shall, if possible, be commercial men or attorneys possessing experience in matters and things to be arbitrated. The arbitrators are empowered to assess the cost and expense of arbitration (including the arbitrator's fees) against the losing party in whole or in part.

1 considering enforceability of arbitration clauses, Plaintiff's
2 position on this issue is extremely weak. Not only have courts
3 held that merely filing an answer containing compulsory
4 counterclaims does not constitute action inconsistent with the
5 right to arbitrate, see Howard Fields & Assoc. v. Grand Wailea
6 Co., 848 F. Supp. 890, 898 (D. Haw. 1993), but also courts have
7 declined to find a waiver of the right to arbitrate even after 21
8 months elapsed between the filing of the Complaint and the motion
9 to compel arbitration. See China Union Lines v. American Marine
10 Underwriters, 458 F. Supp. 132 (S.D.N.Y. 1978); see also Tenneco
11 Resins, Inc. v. Davy Int'l AG, 770 F.2d 416, 420-21 (5th Cir.
12 1985) (finding that a party did not waive right to arbitration
13 where it asserted right to arbitration in its answer but did not
14 move to compel arbitration until eight months later and
15 participated in discovery); Carolina Throwing Co. v. S & E Novelty
16 Corp., 442 F.2d 329 (4th Cir. 1971) (holding that a delay of three
17 months and filing a counterclaim did not constitute a waiver of
18 arbitration). Furthermore, the Ninth Circuit requires a party
19 seeking to prove waiver of arbitration to show both acts
20 inconsistent with the right to arbitration and prejudice to the
21 party opposing arbitration resulting from the inconsistent acts.
22 Fisher v. A.G. Becker Paribas Inc., 791 F.2d 691, 694 (9th Cir.
23 1986).

1 In this case, Defendant has consistently asserted the right
2 to arbitrate, see Answer at 10; Declaration of Cory Birnberg ¶¶ 5-
3 6, 8 Exhibits A, C, D, and has participated in the litigation only
4 by filing an Answer containing compulsory counterclaims.

5 Discovery has not begun, and no trial date is set. Simply put,
6 Defendant's actions are not, as a matter of law, inconsistent with
7 the right to arbitrate, and Plaintiff will suffer no prejudice
8 from an order staying all proceedings in this matter and directing
9 Plaintiff and Defendants to proceed with arbitration as called for
10 by the Towage Agreement. Defendants' motion is therefore GRANTED.

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12 **V. CONCLUSION**

13 The Court finds that Plaintiff has demonstrated that it is
14 entitled to a lien on in rem Defendant in this matter. Claimants'
15 motion is therefore DENIED, except that Plaintiff is ORDERED to
16 post security in the amount of \$500.00. Defendants' motion is
17 hereby GRANTED, all proceedings in this matter are hereby STAYED,
18 and Plaintiff and Defendants ORDERED to proceed to arbitration as
19 provided by the Towage Agreement.
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22 IT IS SO ORDERED.

23 Dated: April 5, 2006
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27 UNITED STATES DISTRICT JUDGE
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